

# An employer's guide to navigating COVID-19 workforce issues in key jurisdictions in Europe

## Belgium, Germany, France and the UK

20 March 2020

Employers are dealing with rapidly evolving workforce challenges arising from the COVID-19 pandemic, the epicentre of which is now Europe. They are grappling with issues of employees being placed on quarantine or self-isolating or forced leave of absence, excess or imbalanced workforces, implementing protocols to minimise health and safety risks, and putting in place business continuity plans (“BCP”) and crisis management plans.

The coronavirus pandemic will require many employers to contemplate radical measures over the coming weeks and months. How should they be planning forwards from an employment law perspective?

Employers in virtually all industries are contemplating drastic decisions they wouldn't have dreamed of just a few short weeks ago. And things may get worse - much worse - before they start to get better.

There are obvious essential short-term measures, such as

- recruitment freezes,
- telling people to work from home where they can, and
- maximising flexibility for those with caring responsibilities.

But what other tools might the employment law toolkit offer us to get through the next few months, and how might employers innovate with an eye to the bigger picture?

Here are some of these questions and issues, and how employers can tackle them across Belgium, Germany, France and the UK

**Note:** In workplaces with a Works Council or similar employee representative body in place, certain information, consultation and /or co-determination rights may have to be observed in relation to some of the measures discussed below.

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## I. Pay Issues

### Question 1: Do you have to pay employees who are off sick with diagnosed Coronavirus?

#### **France**

Employees are entitled to statutory sick pay and additional statutory sick pay and/or continued salary from the employer, if provided for in the applicable collective agreements. The government has temporarily removed waiting periods for entitlement to sick pay and removed conditions for entitlement (such as length of service).

#### **United Kingdom**

Employees will be entitled to statutory sick pay (currently £94.25 per week) and the employer's enhanced sick leave and pay provisions (if any in place). The three-day waiting period for statutory sick pay is removed temporarily.

Employers with fewer than 250 employees will be reimbursed by the Government for Coronavirus-related statutory sick pay they pay to employees for the first two weeks of sickness

#### **Germany**

Employees are entitled to statutory sick pay (up to six weeks). Statutory sick pay is payable at the full remuneration level

#### **Belgium**

Yes, but during a limited period. If an employee is unable to work due to illness (whether due to Coronavirus or otherwise), the employer will have to pay guaranteed wages (a) with respect to white-collar employees during the first month of incapacity and (b) with respect to blue-collar employees during the first 7 days of incapacity, followed by a decreasing percentage of the normal salary during the rest of the first month. After this initial period, the employee shall claim benefits under the social security scheme (70%).

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**Question 2: Do we have to pay employees who are off sick with Coronavirus symptoms, but who have not been diagnosed?**

## **France**

If the employee is signed off sick without a note delivered by the ARS (Agence régionale de santé) regarding coronavirus, they will receive pay in the usual way as provided for by law and the applicable collective agreements

## **United Kingdom**

Yes, if the employee has symptoms which mean they are too unwell to come to work they will be entitled to the employer's usual sick leave and pay provisions, including statutory sick pay.

## **Germany**

Yes, employees are entitled to statutory sick pay if they are unable to perform their duties due to sickness. Employees need to submit a doctor's certificate if they are absent from work for more than 3 days.

## **Belgium**

Yes. Employees shall promptly notify the employer when unable to perform their duties and, in accordance with collective employment agreements or upon the employer's request, provide a doctor's certificate. Since Coronavirus diagnosis tests are not easily accessible in Belgium, doctor's certificates are issued on a remote basis, with a reference to a potential "Coronavirus risk".

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## Question 3: Do we have to pay employees if we ask them not to attend work?

### France

Without the provisions regarding partial activity status applying, employers will have to pay employees full salary. The government has announced a more advantageous partial activity status to reduce costs for businesses. Measures will also be taken in respect of taking paid holiday

### United Kingdom

If an employee is not sick but their employer tells them not to come to work, they should be paid their usual pay. If an employee is asked not to attend work because they are sick, they will be entitled to the employer's usual sick leave and pay provisions, including statutory sick pay. The three-day waiting period for statutory sick pay is removed temporarily

### Germany

Yes, employers have to pay full salary if they ask an employee to stay away from work provided the employee is ready and fit for work.

### Belgium

Yes. The Belgian government has urged all companies to introduce remote working as much as possible. For positions which are not suitable for remote working and for which social distancing and general health and safety obligations cannot be respected, employer shall ask employees not to attend work. In any case the employer shall continue payment of the wages. However, the system of "temporary unemployment due to force majeure" or "due to economic reasons" is available (see *infra*) and may enable the employer to avoid future payments.

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## Question 4: Do we have to pay employees who just refuse to come into work because they're scared?

### France

In theory, no. Employees cannot refuse to attend work on the basis that they are scared of being contaminated. It is for the employer to put in place preventative measures recommended by the government, and impose homeworking for all employees where possible, to enable a maximum level of health and safety. Employees' "right of retreat", which enables an employee to receive full pay whilst not attending work, will not be triggered if the employer has put everything in place to avoid contamination.

### United Kingdom

If an employee refuses to come to work due to genuine concerns that the employer has been unable to resolve, the employer could agree for the employee to work from home or take time off as holiday. The employee would then be paid as usual. If this is not agreed and the employer wants the employee to come to work, there is no obligation to pay the employee. Current government guidance is that employees should work from home where possible

### Germany

No. Employees do not have a general right to stay away from work during an outbreak of illness such as COVID-19. Employees would only be entitled to refuse to work if they cannot reasonably be required to perform their work. The condition of unreasonableness is met if, for example, the work poses a significant objective risk to the employee's health, or if there are at least objective grounds for a serious suspicion that such a risk exists. The mere fact that colleagues have a cough, without further objective grounds for suspicion or indications that a risk exists, will probably not be sufficient to meet this condition. It is, however, possible to agree with the employee to work from home. He/she would then be paid as usual.

### Belgium

No, subject to exceptions. The Belgian federal government has urged all companies to introduce working from home or remote working as much as possible. For positions which are not suitable for remote working and for which social distancing and general health and safety obligations cannot be implemented (exceptions apply), the workplace shall be temporarily closed. In light of the above, and as a general rule, employees cannot refuse to attend the workplace or perform their job due to fear of contamination. If the employee refuses without sufficient grounds such a behaviour can qualify as unilateral contract termination,

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where the employer is no longer obliged to pay the wages.

Only exceptionally, where the employee can evidence that the employer has created a situation where there is a real risk of contamination, and provided that the employer refuses to address such a situation, may such employee invoke the exception of contractual non-performance and thereby refuse to work. In such a case, payment of the salary is due.

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## Question 5: Do we have to pay employees if we decide to close the workplace?

### France

The temporary closure of a workplace during a pandemic allows employers to resort to partial unemployment measures. This ensures that employees continue to receive their salaries during the closure, the costs of which are covered by the state. In practice, employers pay salaries in the usual way (subject to a cap), and are then reimbursed by the state. Supplementary and more advantageous measures will be formalised by decree shortly. The government has already simplified the procedure (including the requirement to consult employee representative bodies).

### United Kingdom

If an employer decides to close the workplace for a temporary period, they will usually need to keep paying their employees full pay. In many cases employees may be able to continue working remotely. If not, the employees who are unable to work would still be entitled to full pay, as they are able and willing to work but the employer is not providing them with work. The exception to this is lay-off. Laying off employees means providing them with no work or pay for a period of time. Some employers may have contracts of employment which allow them to lay-off employees, but this is not common. Unless the employer has a clear contractual right to lay-off or the clear consent of employees could be obtained (which is unlikely), an employer imposing a lay-off would face potential claims for unlawful deduction

### Germany

Yes. With regard to the payment of salaries, the employer is still obliged to pay remuneration if the employees are able and willing to work.

However, the employer may order company holidays or short-time work if the conditions are met.

### Belgium

Yes, the employer remains liable to pay the wages if the employee is able and willing to work. However, unemployment schemes apply (see *infra*). The Belgian federal government has temporarily closed many non-essential business (e.g. retail other than food, restaurants, bars, cinemas, culture, etc.). Some other businesses - which could have remained open - have also decided the same.

#### Temporarily unemployment due to force majeure

The National Employment Office (NEO) has formally acknowledged the Coronavirus as a force majeure-event, guaranteeing the introduction of temporary unemployment due to force majeure until 30 June 2020. This system allows employers to temporarily suspend the employment agreement of (some of) their employees if it's no longer possible for

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from wages, breach of contract and constructive dismissal.

the employer to put these employees to work as a direct consequence of the outbreak. During such a suspension no salary is due by the employer and the employees are entitled to unemployment benefits from the NEO. These benefits have been temporarily (retroactively since 1 February and until 30 June 2020) increased to 70% of the gross monthly salary (capped at 2.754,76 EUR).

Businesses such as bars and restaurants that have been forced to fully or partially close, as well as businesses that voluntarily close down can apply for the system of temporary unemployment due to force majeure for their affected staff.

The NEO shall take its decision within 3 days of receipt of a complete file.

### Temporarily unemployment due to economic reasons

The scheme of temporary unemployment for economic reasons apply when the companies can still employ their workers but are hit by a reduction of their customer base, production, turnover, etc. The conditions for this scheme are stricter than the ones for force majeure (see *supra*). This scheme was initially designed for blue-collar employees, and afterwards extended. With respect to white-collar employees the business shall be acknowledged as an undertaking in difficulty. The procedure may last up to 6 weeks.

For some industries employers (or sometimes industry funds) are required to pay an extra amount on top of the unemployment benefits, based on a collective bargaining agreement.

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For both schemes the employer is entitled on a voluntary basis to pay a supplement on top of the unemployment benefits. Specific conditions apply with respect to social security and withholding on these amounts.

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## Question 6: What are employers' obligations where offices are partially or fully closed?

### France

If workplaces are partially closed, the employer must implement measures imposed by the government regarding the protection of employees, such as making necessary arrangements to the workstation of an employee who has been in contact with an infected person, taking measures for employees who are in contact with members of the public (wearing masks and gloves, washing hands regularly, minimum distance to be kept between customers, etc). In the case of a total temporary workplace closure, the employer must rely on provisions relating to partial unemployment, in order to avoid permanent closure of the workplace. Employment contracts will be put on hold. The government will announce limitations to this in respect of dismissal.

### United Kingdom

At the time of writing, the UK government has not required closure of the workplace if an employee or member of the public with confirmed COVID-19 has recently been in the employer's workplace. However, the local PHE health protection team will contact employers to discuss the case, identify people who have been in contact with the affected person, carry out a risk assessment, and advise on any necessary actions or precautions. If there is a temporary business closure, employers are obliged to continue paying employees' wages in full unless there are contractual provisions that can be relied upon or parties specifically agree otherwise.

### Germany

Employers have a duty of care for their employees. If a COVID-19 infection occurs, the employer must inform staff so that people, who have been in contact with the affected person, can be identified. Employees keep their salary entitlement during a temporary closure of businesses premises.

### Belgium

Employers shall wherever possible promote remote working and provide *ad hoc* tools to employees working remotely.

Employers claiming the benefit of the temporary unemployment measures shall file a declaration with their local NEO offices. Administrative formalities apply.

With respect to force majeure, the employer shall provide documents justifying that the unemployment status is the consequence of a force majeure event. Such a requirement does not apply in case of compulsory closure.

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## Question 7: Do we need to pay staff in a compulsory government lockdown situation where they can't work from home?

### France

All workplaces which have been closed as a result of a compulsory measure are eligible for partial unemployment pay, and will have to make a declaration to the state within 30 days. The state will then cover the costs of salaries during the closure, according to the conditions laid out in statute (100% of salary, with an upper limit of 4.5 times the minimum wage).

### Germany

Generally, the employer has to bear all operational risks and continue to pay the full salary. It is, however, possible that the German Government introduces a new set of provisions governing a compulsory lockdown of businesses.

In addition, the employer has various possibilities to mitigate the financial impact:

- Ordering holiday in accordance with the employee's holiday wishes (transferred holiday leave from 2019 and pro rata for 2020)
- Ordering of company holiday up to a maximum of 3/5 of the annual holiday leave under observance of a reasonable notice

Order of short-time work and application for short-time work compensation at the German job centre ("Agentur für Arbeit")

### United Kingdom

If staff are unable to work from home, employers may need to lay-off these staff members until the lockdown is over. If there's a lay-off clause in their contracts, staff would only need to be paid the statutory guarantee pay – currently £29 a day, increasing to £30 a day from 6 April 2020.

If employees do not have a lay-off clause in their contracts, staff must be paid in full. This also applies if there is no work to be done because of a potential lockdown's impact on business.

### Belgium

Yes. Any business which has been forced to close temporarily shall pay its staff, even if they cannot work from home.

However, the temporary unemployment schemes apply (see *supra*).

Furthermore for business which are allowed to offer limited services (e.g. a restaurant offering catering service) or for businesses which are forced to close on week-ends, temporary unemployment due to force majeure is available.

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**Question 8: Do we have to let employees have (paid) time off to care for a dependent who is sick? Or if a school has closed?**

## **France**

It is not currently possible for an employer to impose paid holiday. A bill put forward on 18 March should enable the government to determine new rules on taking holiday or time in lieu. Employers should also check collective agreements which often provide for time off to care for a sick child.

## **United Kingdom**

Only if it is a contractual right.

Otherwise staff have a statutory (and limited) right to unpaid time off. Employers should check contracts and policies. Some employers offer paid leave for employees who have to deal with emergencies concerning dependents.

## **Germany**

No, if the time off exceeds a “reasonable” time period, generally believed to be 5 to 10 days. If it is less, care for close relatives who become sick (children) will have to be paid for by the employer. Employees who have to stay at home and care for their children due to school and nursery shut downs can take holiday leave or request unpaid leave.

## **Belgium**

As a general rule employees may ask for (unpaid) time off (of maximum 10 days) for an imperious reason, including the sickness of a relative. If they have a child in hospital, the employee may ask for two weeks’ unpaid leave. There are no specific rules applicable to Coronavirus at this stage.

An employee who needs to stay at home to care for their children will in principle not be entitled to temporary unemployment benefits, unless they can provide evidence that there is no childcare available and there is no other alternative.

On the other hand employer and employee can agree to use outstanding holiday entitlement, overtime or compensatory rest, subject to the employee’s consent (see *infra*).

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## Measures to help businesses survive the economic hardship caused by the pandemic

For most employers, this will present significant economic hardship: if the business is forced to close and cut off revenue, but also required to continue paying employees then it is easy to see how this could potentially lead to permanent closures, insolvency and redundancies.

### **Question 9: What about temporary reduction in pay and benefits?**

#### **France**

The government wants to safeguard French business. At this stage, resorting to partial unemployment is the best alternative. The economic impact should enable employers to agree collective agreements to increase working time and/or reduce salaries. The government intends to take further measures on this point, including to change rules relating to daily and weekly rest breaks and Sunday working

#### **United Kingdom**

Consulting with employees and trade unions or other representative bodies and try to agree a temporary reduction in pay and benefits for the duration of the crisis. Under normal circumstances, employees and their representatives would be unlikely to agree to such measures. However, where the alternative is closure and job losses, there may be more of an appetite to reach an agreement.

#### **Germany**

Not possible unilaterally.

Yes, if the employee consents.

#### **Belgium**

Unilateral reductions in pay and benefits are not allowed. Agreement on temporary reductions, provided that these do not fall below the minima set by Collective Bargaining Commissions, are possible, but unlikely. At a later stage, employers and trade unions may negotiate changes in working time or minimum wage. To date the employer may mitigate the impact of the Coronavirus virus by claiming the benefit of temporary unemployment.

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**Question 10: Is short-time working allowed (short-time working means providing employees with less work (and less pay) for a period while retaining them as employees)?**

## **France**

Short time working will effectively be in place if employers implement partial unemployment. It is not possible to impose on employees a reduction of working time which is contractually agreed

## **United Kingdom**

Short-time working means providing employees with less work (and less pay) for a period while retaining them as employees.

If employees are put on short-time working in circumstances where the employer does not have the contractual right to do so then the employer will be in fundamental breach of contract entitling the employee to resign and claim constructive dismissal

## **Germany**

Possible with the consent of the employee or on the basis of an agreement with the workers' representation ("Betriebsrat").

Entitlement to a state subsidy ("Kurzarbeitergeld") under certain conditions.

The German government has taken measures to provide easier access to short-time subsidies in order to secure employments during this crisis

## **Belgium**

The NEO accepts temporary unemployment when the workplace only needs to close down during a limited part of the week (e.g. business not allowed to open on weekends) or affected by a partial closure (e.g., restaurants having to close down, but entitled to offer catering services). Exceptionally, under this scheme, days of unemployment may alternate with working days.

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**Question 11: Is laying-off allowed? Laying off employees means that the employer provides employees with no work (and no pay) for a period while retaining them as employees.**

### **France**

Dismissals should, at this stage, not be necessary thanks to partial unemployment measures. Should it prove necessary, redundancies may have to take place. Currently, employers remain free to make redundancies provided they respect the applicable laws and regulations.

### **United Kingdom**

If employees are laid-off in circumstances where the employer does not have the contractual right to do so then the employer will be in fundamental breach of contract entitling the employee to resign and claim constructive dismissal

### **Germany**

No lay-offs in Germany.

### **Belgium**

Lay-offs are not allowed, since the system allows for temporary unemployment. Individual and/or collective redundancies (i.e. termination of employment agreements) are possible according to and subject to the conditions of the applicable law.

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## Question 12: Can the employer give notice to staff to take paid holiday?

### France

The government is looking at enabling employers to impose paid holiday, within certain conditions. A law will be passed shortly enabling the government to take the required measures

### United Kingdom

Employers are entitled to give notice to workers to take statutory annual leave, provided there is no contrary contractual right

### Germany

Employers may instruct employees to take an appropriate portion of their annual holiday leave if not contrary to legitimate interests of the employee. Further employees may only be eligible for short-time subsidies if they have taken an adequate portion of their annual leave to mitigate the work loss.

### Belgium

No. Employer and employee can agree to use outstanding holiday entitlement, but this requires the employee's consent.

Some consider that the employer could impose overtime or compensatory rest on employees.

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## **Question 13: Can the employer seek volunteers to take unpaid leave?**

### **France**

It is possible to ask employees to take unpaid leave, but this cannot be imposed unilaterally and the consent of employees must be obtained

### **United Kingdom**

Employee consent is required but this is a potentially effective way of achieving cost-cuts may (albeit hugely unpopular). Where employers consider this, they should offer to spread the salary cut over a period of time (1 month off work combined with 5 months with reduced salary by 20% or a similar approach)

### **Germany**

That is possible but depending on the employees' consent.

### **Belgium**

Employers cannot force employees to take unpaid leave. The consent of the employee is always required.

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## Question 14: Is changing terms and conditions allowed?

### France

Any change to the contract must be agreed to by employees, unless there is a specific company agreement with the trade unions or the employee representative body which allows for modification of specific contractual terms (such as working time or remuneration).

### United Kingdom

Where compulsion is necessary, if 20 or more redundancies or forced changes to terms and conditions are proposed at one establishment within a period of 90 days or less, the employer is obliged to inform and consult collectively beforehand for a minimum 30-day period with appropriate representatives of affected employees

### Germany

Changing terms and conditions can be done by mutual agreements. Employers could also give notice with an option to continue the employment with different terms and conditions after expiry of applicable notice periods (“Änderungskündigung”). This is, however, time consuming and triggers significant legal risks regarding unfair dismissal protection.

### Belgium

Any material change to the employment agreement must be agreed by both parties. Imposing remote working on a temporary basis due to the current circumstances will not be considered as constituting a material change.

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## Question 15: What about redundancies?

### France

Collective redundancies are still possible, provided employers comply with the law (consultation of employee representatives, specific procedure, etc)

### United Kingdom

If the longer-term impact of the pandemic is likely to mean that a reduced headcount will be required even when the business reopens then the employer may need to consider redundancies

### Germany

Redundancies may be possible if the pandemic means that it will no longer be possible to continue the employment on the long run, e.g. in case of a closure of the business or a necessary head-count reduction in line with reduced business.

### Belgium

The Coronavirus outbreak will most probably generate bankruptcies in Belgian companies. Alternatively, companies will file for judicial reorganisation, in order to transfer part of their assets (and staff) to a new entity. However, the Belgian insolvency framework did not pass the ECJ's test (Plessers vs. Prefaco, ECJ, 16 May 2019): the option to take over only a portion of a company's staff as part of (court-supervised) reorganisation proceedings was declared contrary to the EU Transfer of Undertakings Directive (2001/23/EC). Parties will thus probably be more reluctant to organise a transfer of assets (and staff) in the framework of such reorganisation proceedings, which may increase the number of bankrupt companies.

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At ebl, we have already started to advise many of our clients on issues relating to COVID-19. With questions and queries wide-ranging, we are here to provide answers to your questions, to act as a sounding board for the decisions you're planning to make and to help you make the key decisions that will protect your business and your communities in the weeks ahead.

Please reach out to your local employment contact by email if you wish to discuss any of the issues in this note or any other employment issues impacting on your operations in Europe further. Alternatively, just contact any of the country lead employment partners listed below for support.

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